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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES M. PERRY, as Trustee, etc., Plaintiff, v. SUZANNE M. TAGUE, as Guardian, etc., Defendant and Respondent; DONALD PERRY et al., Objectors and Appellants.	G042027 (Consol. with G042616) (Super. Ct. No. 30-2008-00067293-PR-TR-LJC) O P I N I O N

Appeals from orders of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Appeal in case No. G042027 dismissed. Appeal in case No. G042616 affirmed.

Deborah J. Dewart for Objectors and Appellants.

McCormick, Kidman & Behrens, Suzanne M. Tague and John Paul Glowacki for Defendant and Respondent.

* * *

This case involves two appeals arising from the appointment of a guardian ad litem for developmentally disabled adults in a trust proceeding. The first appeal (case No. G042027) is from an order denying, without prejudice, a motion to remove defendant Suzanne M. Tague as guardian ad litem for objectors Donald Perry and Diane Perry and sanctioning Deborah J. Dewart, objectors' attorney, for frivolous actions in bringing the motion. The second appeal (case No. G042616) involves objectors' appeal from an order directing the trustee of the family trust to pay defendant her attorney fees and costs in this matter.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2008, James M. Perry filed a petition to be appointed as successor trustee of a family trust created by his now deceased parents, to provide for objectors, described in the petition and at the initial hearing as "developmentally disabled" adults. The trust, created in 1989, had provided for the appointment of a corporate trustee upon the death of both trustors, but the corporate trustee declined to accept the appointment.

The probate court held a hearing on the petition on July 28. An attorney named Jacqueline Miller from an entity named Protection and Advocacy, Incorporated appeared "to request an appointment of an attorney for Donald as well as Diane [Perry]." Albert J. Rasch, Jr., the attorney representing James Perry, objected to Miller's appearance and claimed he represented objectors. The court continued the hearing on James Perry's petition, but decided "to appoint a guardian ad litem to represent [objectors'] interests in this trust" choosing "someone off the court's own list."

The court subsequently appointed defendant as objectors' guardian ad litem. In August, defendant filed a report with the court, summarizing the background of her appointment, expressing her concerns over a possible conflict of interest in allowing James Perry to serve as successor trustee (as objectors' sole remaining next of kin he

would be entitled to the balance of the trust proceeds upon their deaths), plus a dispute over Rasch's representation of objectors in a potential lawsuit against a group home where they had resided for a time after their mother's death. Defendant noted she had not yet been given an opportunity to meet with objectors.

On September 29, Rasch filed an ex parte petition to remove defendant as guardian ad litem. The same day, the court issued a minute order directing her to continue serving as guardian ad litem and to conduct an investigation.

Defendant submitted another report to the court on October 3. She repeated her concerns about James Perry's potential conflict of interest in serving as trustee and Rasch's dual legal representation of both James Perry and objectors. Defendant also reported she had still not had an opportunity to meet and confer with objectors and complained Rasch was interfering with her attempts to do so. In part, Rasch's office had allegedly told defendant that James Perry and his wife planned to be present when she met with them, and the meeting would be videotaped.

At an October 8 hearing, the court ordered a meeting between defendant and objectors be held as soon as possible. It directed that only defendant and an associate from her law office interview objectors, but authorized their current caretakers be present in a supervisory capacity. The court further ordered the interview not be videotaped.

Defendant submitted a report summarizing her interviews with objectors on October 22. She reported Diane Perry "repeat[ed] my questions without much response," but "appeared to be quite content in her environment . . . ." Donald Perry was able to interact with defendant and respond to her questions. He also expressed satisfaction with "his new home" and "appeared well adjusted to the move." Donald Perry told defendant he trusts Rasch and his assistant, Kristina Nicole.

At the next hearing in the trust proceeding, the court approved James Perry's petition to be appointed successor trustee. But the court ruled Rasch could not represent both James Perry and objectors. Rasch informed the court he would continue to

represent only James Perry. He again requested defendant's removal as guardian ad litem. The court denied the request, noting "Ms. Tague has done an excellent job despite all of . . . the interference . . . ."

On October 28, Deborah J. Dewart, purporting to appear as counsel for objectors "by [and] through their guardian ad litem, Sandy Masino," filed a motion to remove defendant as guardian ad litem and for "[a]ppointment of a new [g]uardian [a]d [l]item." Defendant opposed the motion, arguing there was no basis for her removal, Masino lacked standing to make the motion, and the request constituted an improper motion for reconsideration. Citing Probate Code section 1003, defendant also requested sanctions against Masino, Dewart, and Rasch.

On January 29, 2009, defendant filed a petition for an award of attorney fees and costs. The fee request consisted of $9,090 for defendant's own time spent on the case, plus $3,330 for the work done by two other attorneys in her law firm. The petition also requested $802.71 in costs. On the same date, the court continued the hearing on the October 28 motion to remove defendant as guardian ad litem.

In mid-April, Masino filed: 1) A notice of substitution of counsel, retaining Deidre A. Politiski as her attorney, and 2) a formal withdrawal of the requests that she be appointed guardian ad litem for objectors. In this request, Masino denied having retained Dewart or knowing either appellant. She claimed to have signed the petitions solely at the request of Rasch, her employer. Dewart then filed petitions to appoint Herbert Cohen as guardian ad litem for objectors.

The court held a hearing on the matters April 23. Noting the October 28 request was a motion and finding requests to remove a guardian should be brought by a petition, the court denied the motion "without prejudice to filing it in a proper format . . . ." It then conducted a hearing on defendant's sanctions request. Masino reaffirmed she had never met objectors and signed the documents at Rasch's request. Defendant then withdrew her request for sanctions against Masino.

Subsequently, the court issued a minute order ordering Dewart to pay defendant $4,117.50 in fees as sanctions under Probate Code section 1003. It found "[t]here was no basis to bring this motion by Ms. Masino . . . since she has never been guardian ad litem, and indeed, never even met the lawyer filing the motion." Appearing through Dewart, objectors filed an appeal from this ruling.

A hearing on defendant's request for fees and costs was heard May 20. The court took the matter under submission. On July 15, it entered a minute order granting defendant's request "to be paid [by] the trustee of the Perry Trust." Again through Dewart, objectors appealed from the order.

DISCUSSION

1. Case No. G042027

The first appeal is from the April 23, 2009 order. In their appellate briefs, the parties presented arguments on the merits of the ruling. At our request, they filed letter briefs on the following issues concerning the viability of this appeal: (1) Does a party for whom a guardian ad litem has been appointed have standing to retain counsel and independently pursue an appeal; (2) is a ruling made without prejudice appealable; and (3) is an order concerning appointment or removal of a guardian ad litem appealable.

On the first question, there does not appear to be any authority on point. Probate Code section 1003, subdivision (a)(2) declares "[t]he court may, on its own motion . . . appoint a guardian ad litem at any stage of a proceeding under this code to represent the interest of [an incapacitated person] . . ., if the court determines that representation of the interest otherwise would be inadequate . . . ." Under Code of Civil Procedure section 372, subdivision (a), "When . . . an incompetent person . . . is a party, that person shall appear either by a guardian or conservator . . . or by a guardian ad litem appointed by the court in which the action or proceeding is

pending . . . ." Acknowledging the lack of any controlling case authority on the application of these two statutes and the fact neither she nor the probate court "expressed . . . objection to [objectors] retaining counsel to represent their desires," defendant concedes the law may "permit[objectors] and others similarly situated[] to retain counsel to represent their point of view . . . ."

The case law appears to support defendant's view. *In re Moss* (1898) 120 Cal. 695 held Code of Civil Procedure section 372 did not bar a direct appeal by an allegedly incompetent individual for whom a guardianship had been established "where the very question involved is the validity of the order of guardianship itself, and where the appeal is taken directly from that order. That section applies only to a case where the order of guardianship has been finally established." (*Id.* at p. 697; see also *Guardianship of Gilman* (1944) 23 Cal.2d 862, 864 ["The rule that a person under disability must appear by general guardian, or guardian ad litem, does not apply to a case where the very question involved is the validity of the order of guardianship itself and where the appeal is taken directly from that order"].) More recent cases have also allowed independent appeals by parties challenging the basis of a guardian ad litem's appointment. (*In re Joann E.* (2002) 104 Cal.App.4th 347, 353; *In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1186, 1190; *In re Sara D.* (2001) 87 Cal.App.4th 661, 665-667.)

Although objectors contend they are not incompetent, the record contradicts this assertion. At the October 8 hearing, the court told Rasch "[i]t appears on the documentation that your client and you have provided that the [objectors] meet the requirements for having a guardian ad litem appointed for them." Furthermore, objectors' October 28 motion itself sought not only defendant's removal, but the appointment of another guardian ad litem for objectors.

But in any event, on the latter two issues the law is settled that no appeal lies. *Estate of Keuthan* (1968) 268 Cal.App.2d 177 dismissed an appeal from an order denying distribution of an estate "without prejudice." (*Id.* at p. 179.) "In the case at

bench the probate court did not pass upon the merits of the petition for distribution. It gave no reason for its order except what is implied in the statement that the petition 'is denied without prejudice . . . .' This is no more than a postponement. . . . The words 'without prejudice' eliminate any binding effect that the order appealed from might have." (*Id.* at p. 180.)

The same is true here. The probate court denied objectors' motion for a procedural reason, that it was brought by way of a motion and not a petition, and postponed any ruling on its merits.

The latter portion of the court's order awarding sanctions against Dewart cannot save the appeal. First, the court based the sanctions on the misrepresentations asserted in attempting to have Masino replace defendant as objectors' guardian ad litem. Second, the sanctions award was against Dewart and since it affected her interests only, objectors were not "aggrieved" by the award. (Code Civ. Proc., § 902; *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737 ["One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment"].) An order imposing sanctions on an attorney can be appealed, but the appeal must be brought by the attorney, not the party represented by the sanctioned lawyer. (*In re Marriage of Knowles* (2009) 178 Cal.App.4th 35, 38, fn. 1; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42.) Here, the appeal was filed by Dewart on behalf of objectors alone.

Finally, we agree with defendant that an order denying a request to remove a guardian ad litem is not appealable. "[T]o prevent delay[]" (*Varney v. Superior Court* (1992) 10 Cal.App.4th 1092, 1098), "[t]he courts have consistently held that appeals in probate matters are limited to those expressly provided by statute" (*Estate of Schechtman* (1955) 45 Cal.2d 50, 54; see also *Gertner v. Superior Court* (1993) 20 Cal.App.4th 927, 930). Probate Code section 1300 declares "an appeal may be taken from the making of, or the refusal to make, any of the following orders: [¶] . . . [¶] (g) . . . removing[] or discharging a fiduciary. . . ." That code defines the term "[f]iduciary" to "mean[]

personal representative [in the administration of a decedent's estate], trustee, guardian, conservator, attorney-in-fact under a power of attorney, custodian under the California Uniform Transfer To Minors Act . . ., or other legal representative subject to this code." (Prob. Code, § 39.)

A guardian ad litem is not the equivalent to any of the foregoing described categories of fiduciaries. Each of these representatives is granted authority to handle another person's legal affairs. One who serves as a guardian ad litem acts as the representative of a party to an action and as an officer of the court (*Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 13) solely "to protect the [party's] interests in the litigation [citations]" (*Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 47; see also *In re Christina B.* (1993) 19 Cal.App.4th 1441, 1453). Also, unlike the above-named fiduciaries, a guardian ad litem's "appointment may properly be made on an ex parte application. [Citations.]" (*Sarracino v. Superior Court, supra,* 13 Cal.3d at p. 12; see also *In re Marriage of Caballero* (1994) 27 Cal.App.4th 1139, 1149.)

Furthermore, courts have generally held orders either appointing or revoking the appointment of a guardian ad litem are generally not independently appealable. (*Estate of Hathaway* (1896) 111 Cal. 270, 271; *In re Marriage of Caballero, supra,* 27 Cal.App.4th at p. 1149; *Estate of Corotto* (1954) 125 Cal.App.2d 314, 324.) In *Hathaway*, the probate court appointed a guardian ad litem for an incompetent person who claimed to be the decedent's heir at law. Through her guardian ad litem, she petitioned to revoke probate of the decedent's will. The estate's executor obtained an order vacating the guardian ad litem's appointment and striking her petition. The Supreme Court dismissed an appeal from these rulings. As for revoking the guardian ad litem's appointment, it noted "[n]o letters of guardianship are issued to a guardian ad litem, but his authority is evidenced by the entry in the minutes of the court appointing him. He is appointed by the court in which the action is pending in each case; and his removal, as well as his appointment, is under the control of the court in which the case is

pending. If an appeal could be taken from the order removing him, it could with equal reason be taken from the order appointing him, and the very purpose of the appointment would be frustrated." (*Estate of Hathaway, supra,* 111 Cal. at p. 271, italics omitted.)

Probate Code section 2, subdivision (a) declares "[a] provision of this code, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment." Under Probate Code section 1301, orders "[g]ranting or revoking of letters of guardianship . . . except letters of temporary guardianship" are appealable. (Prob. Code, § 1301, subd. (a).) Thus, nothing in the current Probate Code suggests it was intended to alter the prior law as it applies to guardians ad litem.

Consequently, we dismiss the appeal in case No. G042027.

2. Case No. G042616

The second appeal is from the order awarding defendant her attorney fees and costs. The court entered the award under Probate Code section 1003, subdivision (c). It declares, "The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of the property of the estate involved or by the petitioner or from such other source as the court orders." Defendant made a motion and supported it with documentation. James Perry, as trustee opposed the request, albeit unsuccessfully.

Objectors question the scope and constitutionality of the foregoing statute. But they cite no authority supporting these arguments. Further, given their reliance on only the facts supporting their position while ignoring the contradictory showing upon which the probate court relied, they provide no basis to conclude the award was invalid. "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Attorney fee awards based on

statute are reviewed for abuse of discretion. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 998.) Again, "[a]n abuse of discretion is never presumed and it must be affirmatively established. [Citations.]" (*Wilder v. Wilder* (1932) 214 Cal. 783, 785.) Thus, "[i]t is incumbent upon an appellant to make it affirmatively appear that error was committed by the trial court; an appellate court cannot presume error. [Citation.]" (*McDaniel v. Dowell* (1962) 210 Cal.App.2d 26, 33.) No basis appears to exist to support reversal of the award.

DISPOSITION

The appeal in case No. G042027 is dismissed. The appeal in case No. G042616 is affirmed. Respondent shall recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.